

))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2032 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 : No

NISHANT HASMUKHBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

Mr. N.D. Nanavati, Senior Counsel, for
NANAVATY ADVOCATES for Petitioner
Mr. D.N. Patel, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 02/07/98

ORAL JUDGEMENT

Rule. Service of Rule is waived by learned Additional Public Prosecutor, Mr. D.N. Patel for the respondent. By the consent of the learned advocates for the parties, this Criminal Misc. Application is taken up for final hearing.

The petitioner, Nishant Hasmukhbhai Patel, has filed this application under Section 438 of the Code of

Criminal Procedure ("Code" for short), for enlarging him on anticipatory bail in connection with CR No.0231 of 1998 of Satellite Police Station, for the offences punishable under Sections 307, 323, 324, 341, 427, 147, 148, 149 of the Indian Penal Code.

Earlier the petitioner had moved this Court by filing Criminal Misc. Application No.1549 of 1998 for the same reliefs and the Court (Coram: Kundan Singh, J.), by order dated May 14, 1998, permitted the petitioner to withdraw that application for anticipatory bail during the course of arguments and that application was rejected as withdrawn. After the withdrawal of the above application for anticipatory bail, the petitioner has not surrendered before the Investigating Agency and has remained absconding.

The few relevant facts are as under:

The complainant, Rupaliben, wife of Suryavir Sinh, is residing at Ahmedabad. Dileshvir Sinh is the brother of Suryavir Sinh. On May 2, 1998, Rupaliben, along with her husband, Suryavir Sinh, had gone to the Pleasure Island Club, in the company of their friend Amit Kohli and his wife Jyotiben. At around 11.30 p.m., when they reached the club, accused No.1 Bholio alias Kalpesh Patel was standing with accused No.5 Paritosh alias Kulio. The complainant along with her husband and two of her friends went inside the club and played snooker till 2 a.m. Dileshvir Sinh, who is the brother in law of the complainant, along with his friends had also come to the club. At around 2 a.m., the complainant along with her husband accompanied by Jyotiben and Amit came out of the club and were proceeding to the place where they had parked their car. When they came out of the club, they saw accused Bholio and his brother Pochio standing near the club with naked swords in their hands. The complainant also saw that accused Bholio was accompanied by eight to ten persons who were armed with deadly weapons and were standing near the club. The husband of the complainant, Suryavir Sinh, apprehended that, because of some previous enmity between Bholio and Dilesh, Dilesh might be attacked, as Bholio and his companions were armed with deadly weapons. In the meantime, two/three persons, who were armed with weapons, came near the place where the car of the complainant was parked and asked Bholio that was this the same person, and the Bholio nodded his head in affirmative and said 'yes', and pointing to Dilesh, he said that last time he had escaped but this time should be done to death. After the above

words were spoken, accused No.1, Bholio, and his brother, accused Pochiyo (absconding), had attacked Dilesh with swords, whereas other persons, who were members of the unlawful assembly, had also given blows with their weapons like iron-pipes and iron-rods. In the meantime, the complainant also tried to save the life of Dilesh, but she was caught hold of by the petitioner herein and was manhandled by him. In the meantime, Suryavir Sinh tried to rescue injured Dilesh and at that time he was given blow with sword by accused Pochiyo. Suryavir Sinh warded off the blow of sword which struck his hand and his hand got injured and there was profuse bleeding. Suryavir Sinh was also dealt with blows with iron pipes and iron rods by the members of the unlawful assembly and was thrown on his car. Glass-screen of the rear portion of the car was also broken with the help of iron pipes and iron rods. As Dilesh was seriously injured, he ran towards right side of the club and he was chased by all the accused. In the meantime, the complainant had conversation with the petitioner who told her that, if he was not present, the assailants would have finished them. In the meantime, Bholio, who was armed with sword, told the members of the unlawful assembly that "enough is enough" and told his brother Pochiyo to leave the place. Thereafter the accused No.1 Bholio, accused No.2 Pochiyo, accused No.3 Nepali, accused No.4 Nishant (petitioner herein), accused No.5 Paritosh alias Kuliyo and other members of unlawful assembly left in three cars from the premises of the club. In the first information report lodged by the complainant, Rupaliben, it is specifically stated that, at the time of incident, the accused persons, who were unlawfully assembled, were in drunken condition and strong liquor smell was emitting from their mouth.

Dilesh was seriously injured on his head as severe blows with sword, iron pipes and iron rods were given on the head and body. One Layala Jahangir Cama, who was accompanying Dilesh, took the injured Dilesh to Dr. Maniyar Hospital, which is situated near Patelnagar Society, Off C.G. Road. Suryavir Sinh was also treated at the Dr. Maniyar Hospital.

After reaching Dr. Maniyar Hospital, Layala, who was accompanying Dilesh, had sent vardhi (message) to the police control room at 3.55 a.m. on May 3, 1998 from Dr. Maniyar Hospital, informing that, at around 1.30 to 2.30 a.m. on May 3, 1998, at Pleasure Island, Opposite Rajpath Club, an incident of beating had taken place, wherein, accused Bholio of Ganesh Corporation, Nishant Patel (petitioner herein), Nepali, Pochiyo, in all ten

persons, armed with swords, iron pipes and rods had attacked Dilesh and Suryavir Sinh and Dilesh had sustained serious injuries on his head and was unconscious in the hospital.

This vardhi shows that at the very first point of time names of accused Bholio, Nishant Patel, Nepali, Pochiyo were disclosed. Weapons which were used in the assault were also mentioned.

The complainant lodged first information report at the Satellite Police Station at around 6 a.m. narrating the whole incident, which is corroborated by the version set out in the vardhi.

It is borne out from the first information report and vardhi that the petitioner was one of the members of unlawful assembly whose common object was to cause murder of Dilesh, and to cause injuries to whoever come to rescue him. The name of the present petitioner appears in the vardhi as well as in the first information report and, therefore, his presence cannot be doubted. The petitioner had caught hold of the complainant when she made attempt to save the life of Dilesh and her husband Suryavir Singh. Ultimately, the complainant had to give a push to get out of the hold of the petitioner. The involvement of the petitioner is, thus, prima facie, proved by the evidence collected by the Investigating Agency during investigation.

Mr. N.D. Nanavati, learned counsel for the petitioner, has, vehemently, submitted that no overt act was committed by the petitioner in the incident. This argument of the learned counsel for the petitioner deserves to be rejected. As ruled by the Apex Court in the case of Lalji vs. State of U.P, reported in AIR 1989 SC 754, section 149 creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. Thus, once the court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. It is further ruled by the Apex Court that it is not open to the court to acquit members of the unlawful assembly for lack of corroboration as to thier participation. In the case of Banwari Ram and others vs. State of U.P., reported in 1998 Supreme Court Cases (Cri.) 835, the Apex Court ruled

as under:

"Once it is held that the accused were also members of an unlawful assembly they will be liable for the unlawful activities of the members of the said assembly even if they might not have actually fired the guns. It is well settled that if an offence is committed by some members of an unlawful assembly then the other members of the assembly are also liable for the offence under Section 149."

Therefore, at this stage, when the police papers disclose that the petitioner was a member of unlawful assembly and had shared common object of the unlawful assembly, prima facie offences, as stated in the first information report, are made out.

It is submitted by the learned counsel for the petitioner that there is vital change in circumstance and because of the vital change in circumstance the petitioner has filed this application for anticipatory bail. In my opinion, this submission is also devoid of any merit. In the present application for anticipatory bail, there is no change of circumstance as suggested by the learned counsel for the petitioner. The first application was withdrawn during the course of arguments. As per the decision rendered by this Court, in the case of Shyamdutt Upadhyay vs. State of Gujarat, reported in 1992 (1) GLR p.121, successive bail application is not maintainable unless fresh circumstance or ground is made out. It is also held that withdrawal of bail application would amount to its rejection. Therefore, the second application, on the same facts and circumstances, is not maintainable.

It is also vehemently submitted by the learned counsel for the petitioner that, as one accused, namely, Tanmay, who was one of the members of the unlawful assembly, and was armed with deadly weapon, was released by the Sessions Court on regular bail and the application for cancellation of bail filed by the State of Gujarat is rejected by this Court, and, as the petitioner stands on better footing, he should be enlarged on anticipatory bail. In my opinion, this arguments of the learned counsel for the petitioner is devoid of any merit. The accused Tanmay was released on bail by the Sessions Court and the State of Gujarat had filed an application for cancellation of bail in the High Court. This Court had rejected the application for cancellation of bail on the ground that no grounds were made out for cancellation of

bail as per the principles laid down by the Apex Court. In my view, the release of accused Tanmay cannot be said to be change of circumstance.

While granting bail, facts and circumstances of each case are to be borne in mind. The petitioner is found missing since the day of incident. The Investigating Officer had made several attempts and had called the petitioner for interrogation, but the petitioner was not available. Summons were also issued under Section 160 of the Code and those summons could not be served on the petitioner. This makes it clear that the petitioner, with deliberate intention, has tried to avoid interrogation by the Investigating Agency and has tried to create hindrance in carrying out smooth investigation. Even after the withdrawal of the application for anticipatory bail in the High Court, the petitioner has not surrendered before the Investigating Agency. Therefore, the petitioner is not entitled to the discretionary relief of anticipatory bail.

In the case of Pokar Ram vs. State of Rajasthan, reported in AIR 1985 Supreme Court 969, the Supreme Court has ruled that, when a person is accused of an offence of serious nature, the court has to be careful and circumspect in entertaining application for anticipatory bail. It is further ruled that:

"Status in life, affluence or otherwise are hardly relevant considerations while examining the request for granting anticipatory bail. Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature."

Similarly, in the case of K.K. Jerath vs. Union Territory, reported in (1998) 4 Supreme Court Cases 80, the Supreme Court has ruled that when investigation is likely to be impeded and when there is chance of tampering with the prosecution evidence, anticipatory bail should be refused. In the present case, the petitioner is a close associate of the accused No.1, Bholio. As stated earlier, the petitioner was member of unlawful assembly and had shared the common object to cause murder of Dilesh. The conduct of the petitioner at the time of incident shows that he had taken active part by catching hold of the complainant even at the end of the incident. The accused No.1, Bholio, had called the petitioner to accompany him while leaving the place of incident, and, right from the beginning, the petitioner, who is a close associate of Bholio had accompanied him. Merely because the complainant had uttered word 'brother' will not absolve the petitioner from the vicarious liability of unlawful

assembly. The way in which the petitioner has tried to run away from the investigating agency and not cooperating with it, points out that if he is enlarged on anticipatory bail he will tamper with the prosecution witness, and the investigation will be impeded.

It also requires to be stated that the petitioner, before filing of these two applications for anticipatory bail, had not approached the Sessions Court. As per the decision of this Court in the case of Rameshchandra Kashiram Vora vs. State of Gujarat, reported in 1986 GLH 836, normally the accused should file application in the Sessions Court rather than directly approaching the High Court. When in law two Courts are having concurrent jurisdiction the party must first exhaust the remedy before the Sessions Court and then, if necessary, approach this Court. Otherwise, it would amount to incursion of sound practice and spirit of law. On this ground also, this application deserves to be rejected.

As a result of foregoing discussion, this application is rejected. Rule is discharged.

The aforesaid observations are only tentative and the same shall not come in the petitioner's way at the stage of trial.

(swamy)